COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1149

COMMONWEALTH

vs.

DARREN WILLIAMS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is an appeal by defendant Darren Williams from convictions of kidnapping, assault and battery on a household member, resisting arrest, and furnishing a false name, following a jury trial in 2016.[1] The defendant argues that (1) the trial judge erred in not giving a requested jury instruction on specific unanimity; (2) the evidence was insufficient to sustain the conviction of resisting arrest; and (3) the defendant was unfairly prejudiced by the admission of testimony by the first complaint witness without a timely or clear limiting instruction. We affirm.

Background. At the time of the underlying offenses, the defendant and the victim were in a relationship and cohabitating

[1] The jury acquitted the defendant of the charges of rape and assault with intent to rape.

in her apartment in Fall River. In the late evening of February 16, 2015, after a group of the victim's friends left the apartment, an argument between the victim and the defendant ensued because he felt that her friends were disrespectful to him. The defendant punched the victim. The defendant is a very large man, standing six feet, five inches tall and weighing 350 pounds. The victim eventually called the police around 2:30 A.M. Two police officers arrived and, after speaking with the defendant and the victim separately, including advising the victim of her rights as a domestic violence victim to have the defendant removed, the police officers left the apartment around 3 A.M. At trial, the victim testified that after the police left, she and the defendant resumed their argument. At some point, the victim became undressed.[2] She testified that the defendant would not let her get dressed or leave the bedroom, and that she cried herself to sleep.

Several hours later, the victim awoke, got dressed, and attempted to leave the apartment. The defendant, however, repeatedly blocked her exit. The victim went to the kitchen to cook and, in the midst of a panic or anxiety attack and when the defendant was looking away, she opened and jumped out the first-

[2] The victim testified that the defendant held her down so she could barely breathe and anally raped her. The defendant was found not guilty of rape.

floor kitchen window. At the time, there were several feet of snow on the ground and she was dressed only in pants and a shirt without socks or shoes. She ran across the street and persuaded a pedestrian to call the police. While the pedestrian called the police, the victim returned to the front porch of the apartment. By this time the defendant was standing on the front porch. The victim told him that he should leave because the police were coming. The defendant grabbed the victim by her braided hair and forcibly dragged her back into the apartment, locking both the front door and the bedroom door behind them.

When the responding officer, Officer Huard, went to the victim's apartment, he noticed a window missing and saw debris and footprints in the snow. After hearing the victim's screams, Officer Huard called for backup before kicking down both the apartment and bedroom doors. There Officer Huard saw the defendant seated at the end of the bed holding the victim down, with his pants and underwear down his legs. The defendant complied with the officer's orders to release the victim and to allow the officer to restrain him with two sets of handcuffs. A second officer arrived and, after pulling the defendant's pants up, they told the defendant that he was under arrest. By that time, there were four police officers in the apartment. When they attempted to escort the defendant from the apartment to the police cruiser, the defendant broadened his shoulders, planted

his feet, and pulled away from police. When the police eventually got the defendant to the cruiser, he moved his arms and legs to interfere with the patfrisk, spread his legs, and stiffened his chest to prevent being forced into the vehicle. After warning the defendant to comply and then attempting to subdue him with pepper spray, the police used a Taser on the defendant. The officers were then able to get the defendant into the police cruiser.

Discussion. Specific unanimity instruction. The defendant first argues that the judge erred in denying his request for a specific unanimity instruction regarding the kidnapping charge because the Commonwealth presented evidence of two separate and distinct instances of kidnapping. The first, the defendant asserts, occurred when the defendant confined the victim to her bedroom and prohibited her from getting dressed or leaving. The second occurred when the defendant grabbed the victim by her hair and dragged her into the apartment, locking all doors behind them and holding her down. In considering the defendant's request, the judge indicated that she believed the instruction applied to the sexual assault charges, a misconception the defendant did nothing to correct and to which he did not object. Appellate rights are not preserved where a party objects only generally to the instructions in their entirety, or where a party fails to bring an alleged error to

the attention of the judge in time for her to correct the error. See Mass. R. Crim. P. 24 (b), 378 Mass. 895 (1979); Commonwealth v. Keevan, 400 Mass. 557, 563-564 (1987). Thus, we review for a substantial risk of a miscarriage of justice. We conclude that, even if the judge had considered the jury unanimity instruction request as related to the kidnapping instruction, there was no error and no substantial risk of a miscarriage of justice. See Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967); Commonwealth v. Mienkowski, 91 Mass. App. Ct. 668, 675 (2017).

A specific unanimity instruction is required "only if there are separate events or episodes and the jurors could otherwise disagree concerning which act a defendant committed and yet convict him of the crime charged." Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 904 (1995). However, "[w]hen a single count is charged and where the spatial and temporal separations between acts are short, that is, where the facts show a continuing course of conduct . . . a specific unanimity instruction is not required." Id. at 905. See Commonwealth v. Santos, 440 Mass. 281, 285 (2003). Here, as in Thatch, a single count of the offense was charged and prosecuted and, despite the fact that multiple acts related to the offense occurred, the "spatial and temporal separations between the acts [were] short, [and] . . . the facts show a continuing course of conduct." Thatch, supra.

Resisting arrest. The defendant next argues that the evidence was insufficient to sustain a conviction of resisting arrest. One resists arrest by either "using or threatening to use physical force or 'using any other means' to create a 'substantial risk of causing bodily injury.'" Commonwealth v. Grandison, 433 Mass. 135, 144 (2001), quoting G. L. c. 268, § 32B. While a conviction of resisting arrest cannot "rest on postarrest conduct," Grandison, supra at 145, here, the resistant conduct of the defendant occurred "immediately after being handcuffed, [and] prevented and preceded the conclusion of the sequence of events that consummated his arrest." Commonwealth v. Katykhin, 59 Mass. App. Ct. 261, 263 (2003) (conduct sufficient under statute included using force to refuse to enter police cruiser).

Officers testified that the defendant, who is six feet, five inches tall and over three hundred pounds planted his feet and broadened his arms and shoulders to avoid being escorted by four police officers through the apartment door and into the cruiser. Additionally, the police were required to use both pepper spray and a Taser to subdue the defendant enough to put him in the cruiser, exposing them to a substantial risk of bodily injury. Viewing this evidence in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), we conclude that the defendant's

behavior fell within the statutory language and that the evidence was sufficient under either of its prongs.

First complaint limiting instruction. Finally, the defendant argues that he was unfairly prejudiced by the admission of testimony by Officer Huard, the first complaint witness, without a limiting instruction. Specifically, the defendant argues that the jury may have considered Officer Huard's testimony as corroborative evidence of the kidnapping because the instruction the judge gave followed the testimony and was so ambiguous as to confuse the jury. We disagree. "First complaint testimony may be admitted for a limited purpose only, to assist the jury in determining whether to credit the complainant's testimony about the alleged sexual assault." Commonwealth v. King, 445 Mass. 217, 219 (2005), cert. denied, 546 U.S. 1216 (2006). Here, prior to jury empanelment, the Commonwealth moved to have the officer's testimony, which was initially proffered as first complaint testimony, admissible substantively as excited utterances. The judge's instruction to the jury the next day, which followed a sidebar conference wherein the judge agreed with defense counsel to limit the testimony's permissible use to first complaint considerations, closely tracked the instruction set forth in King, supra. The fact that the instruction was delivered immediately following the officer's testimony, rather than preceding it, is not

determinative of its validity. See Commonwealth v. Lewis, 91 Mass. App. Ct. 651, 663-664 (2017). The jury were explicitly told that it could use the first complaint testimony only for the very limited purpose of assessing the victim's credibility and reliability as it related to the sexual assault. This instruction was repeated, and not objected to, in the judge's final charge.[3] We presume that the jury understood and followed the judge's limiting instructions. See Commonwealth v. Martinez, 476 Mass. 186, 194 (2017). We conclude that the judge's instruction was neither untimely nor erroneous and, accordingly, that there was no substantial risk of a miscarriage of justice. See Mienkowski, 91 Mass. App. Ct. at 675;

[3] The jury were further properly instructed that they could not "consider this testimony as evidence that the assault, in fact, occurred" (emphasis added). The defendant suggests that this language implied by omission that, notwithstanding the initial forceful instruction on the "very limited purpose" for which they could use the testimony, the jury were free to consider the testimony as evidence that the kidnapping occurred. Had the defendant requested a further limiting instruction telling the jury they could not do so, the judge could have given such an instruction, but she was not obligated to give it sua sponte. See Commonwealth v. Sullivan, 436 Mass. 799, 809 (2002).

Commonwealth v. Starkweather, 79 Mass. App. Ct. 791, 802-803 (2011).

Judgments affirmed.

By the Court (Agnes, Sacks & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: August 1, 2019.

[4] The panelists are listed in order of seniority.